78-1095

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1978

No.

VIJAY S. KUMAR,

Petitioner,

-against-

REBERTA INGRAM, as Administratrix of the goods, chattels and credits which were of Walter Ingram, deceased, and REBERTA INGRAM, individually,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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INTRODUCTORY STATEMENT

The respondent is submitting this brief in opposition to the petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the grounds that there are no issues requiring determination by this Court and the petitioner's statement of the facts is misleading.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 585 F.2d 566 (2d Cir 1978). The memorandum decision of the United States District Court for the Western District of New York (Appendix B of the petition) is not reported.

QUESTIONS PRESENTED

1. Where an action is timely filed prior to the expiration of the Statute of Limitations,

but the plaintiff misspells the defendant's name as Vijaya N. Kumar, rather than "Vijay S. Kumar", and service is effected upon the proper defendant within a reasonable period of time, does the mere adding of an "a" to the defendant's first name and the substitution of a different middle initial require that the plaintiff's action be dismissed?

2. Where an action has been properly and timely filed, and the parties know that the defendant intended is Vijay S. Kumar and the defendant's first name and middle initial have been misspelled as Vijaya N. Kumar, rather than Vijay S. Kumar, does this require that the plaintiff's action must be dismissed and that the action has not been timely commenced against Vijay S. Kumar because of the misspelling of the defendant's first name and middle initial?

3. Where the plaintiff in good faith

relied upon the Second Circuit's decision in Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968) -- that filing of the summons and complaint was sufficient to toll the statute of limitations and that actual service is not required -- would it be just and equitable to dismiss the plaintiff's claim in this action even if the Court were to rule that in the future in a state where actual service is required, mere filing of the summons and complaint is insufficient and actual service would have to be made in order for the statute of limitations to be tolled?

STATUTES AND RULES INVOLVED

In addition to Rules 3 and 15 of the Federal Rules of Civil Procedure, contained in the petition, the respondent believes that

Rule 4(h) of the Federal Rules of Civil Procedure, should likewise be considered by the Court.

Federal Rules of Civil Procedure

Rule 4(h) Amendment.

> "At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued."

New York Civil Practice Law and Rules

Section 1024. Unknown parties.

> "A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly."

STATEMENT OF THE CASE

The defendant in this action is a physician who while practicing medicine in the State of Illinois during the period between January 6 - 15, 1975, treated the decedent Walter Ingram. The complaint alleges that the defendant treated the decedent negligently so as to cause his wrongful death.

Sometime after January 1975 the defendant apparently left the State of Illinois and moved to the State of New York.

On December 28, 1976, the plaintiff, as Administratrix of the decedent's Estate commenced an action in the United States District Court for the Southern District of New York by filing a summons and complaint with the Clerk of the Court pursuant to Rule 3 of the Federal Rules of Civil Procedure.

In filing the summons and complaint, the plaintiff misspelled the defendant's name as "Vijaya N. Kumar" rather than "Vijay S. Kumar". Plaintiff's counsel had consulted the New York State Medical Directory and found the name of Vijaya N. Kumar, and thus, was led to believe that this was the proper spelling of the defendant's name.

In an attempt to expedite service, plaintiff's counsel had a special process server appointed. Plaintiff's special process server proceeded to the address found for Kumar in the medical directory, but when it was revealed that there were in fact two Kumar's and the address in the medical directory referred to Vijaya N. Kumar and not to the defendant Vijay S. Kumar, plaintiff's counsel then ascertained the defendant Vijay S. Kumar's address in Jamestown, New York and had a second special process server appointed to

serve the defendant in Jamestown.

The defendant was admittedly properly served with a summons and complaint on May 6, 1977. On May 23, 1977, counsel for the defendant Kumar made a motion to dismiss this action on the ground that the venue was improper since the defendant was a resident of the Western District of New York, and not the Southern District of New York. This initial motion by defense counsel made it clear that they were fully aware that the defendant Vijay S. Kumar was the party intended to be sued by the plaintiff and there had simply been a misspelling of the defendant's name. In their notice of motion to dismiss for improper venue, counsel for the defendant designated themselves as attorneys for "Vijay S. Kumar s/h/a Vijaya N. Kumar", clearly indicating that they considered the defendant's name to have been misspelled and

admittedly knew that the defendant Vijay S. Kumar was the party against whom this action was directed.

The Southern District of New York denied the defendant's motion to dismiss for improper venue, but transferred this action to the Western District of New York.

On or about July 11, 1977 the defendant filed an answer admitting jurisdiction and raising no affirmative defenses and then on or about July 13, 1977 filed an amended answer for the first time alleging the statute of limitations as a purported defense. Both the answer and amended answer indicate that counsel for the defendant were fully aware that the action was directed at Vijay S. Kumar and they continuously referred to the defendant as "Vijay S. Kumar s/h/a Vijaya N. Kumar."

The defendant then brought on a motion to

dismiss in that the plaintiff had failed to diligently prosecute this action because service had not been effectuated upon the defendant until May 7, 1977 and that the date of service upon the defendant was more than two years from the last date that the defendant had treated the decedent and the action was thus allegedly barred by the Illinois statute of limitations.

The defendant was compelled to admit that pursuant to Rule 3 of the Federal Rules of Civil Procedure an action is deemed commenced when filed and that this action was admittedly filed on December 28, 1976, well within the two-year period from the defendant's last treatment of the decedent. The defendant, however, took the position that the action had only been commenced as against Vijaya N. Kumar and not against the defendant Vijay S. Kumar because the defendant's name had been misspelled

on the summons and complaint. In addition, the defendant argued that since under New York State Law a defendant must be served with the summons in order to toll the statute of limitations and not simply filed that the federal court must likewise follow this procedural method and that since the defendant was not served until more than two years after his last treatment of the decedent, his action was time barred.

The plaintiff brought on a cross-motion to correct the spelling of the defendant's name in the caption.

The District Court Judge denied the defendant's motion to dismiss and granted the plaintiff's motion to correct the spelling of the defendant's name in the caption, as provided in Rule 4(h) of the Federal Rules of Civil Procedure.

On Appeal to the United States Court of Appeals for the Second Circuit, the Second Circuit, in a well reasoned decision, affirmed the order of the District Court (See Appendix A annexed to the petition).

THE REASONS FOR NOT GRANTING THE WRIT

1. The contention that the Court below in refusing to dismiss the plaintiff's complaint as being time barred because there had been a minor misspelling of the defendant's first name and the substitution of a different middle initial had in effect permitted the addition of a new party after the statute of limitations has run, is shear sophistry, and the decision of the Court below is not in conflict with the decisions of other Circuits.

The petitioner, on page 7 of his petition, claims that

> "The Second Circuit correctly found that this case did not fit within the category of a 'mere misnomer,' and concluded that it must be treated as an amendment 'changing the party against whom a claim is asserted.'"

This is an obvious misstatement of what was in fact said by the Second Circuit, and deliberately misleading.

The Second Circuit did not say that the case now before the Court involved anything more than a mere misnomer. What the Second Circuit said is:

> "Thus, we conclude that an amendment merely correcting a 'misnomer' is nonetheless one 'changing the party against whom a claim is asserted.'"

The Second Circuit carefully pointed out that under the law in Illinois, where this action could have been commenced, and the law of various other states, filing of the summons with the Court is sufficient to toll the statute of limitations. See Ill. Ann Stat. ch. 110, §13; ch. 70, §2 (Smith-Hurd); 27 A.L.R.2d 236, §4.

There is thus no prejudice to the defendant if this action was commenced in New York

and the District Court applies Rule 3 of the Federal Rules of Civil Procedure, which provides that a Civil action is commenced by the filing of the complaint.

The Second Circuit also pointed out that the defendant in this case would have had the exact same notice of this action if his first name would have been spelled as "Vijay" rather than "Vijaya", and his middle initial had been set forth as "S" rather than "N".

The Second Circuit stated:

> "There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly." 585 F.2d at 571.*

*It should be called to the Court's attention that under New York CPLR 1024, which provides that "A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes

Or, as the Second Circuit further stated:

> "If plaintiff's action would have been timely had her complaint correctly named Vijay S. Kumar, even though he had no notice until four months after expiration of the limitations period, then we think the minor misspelling of defendant's name should not alter this result." 585 F.2d at 571

The Second Circuit also pointed out the irony and lack of merit to the defendant's contention that the complaint should be dismissed for a misspelling and wrong initial, when the defendant himself had misspelled his own name in numerous ways in papers submitted to the District Court (585 F.2d at 572).

known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." It would have been perfectly proper for the plaintiff to have commenced her action against the defendant under the designation V. Kumar. Plaintiff should not be penalized for having attempted to designate the defendant more completely, and in doing so, misspelled his uncommon first name, and substituted an "N" for an "S" as his middle initial.

The two cases relied upon by the defendant as allegedly creating conflict among the Circuits which require certiorari to be granted so that the conflict may be resolved by this Court do not create any real conflict, but only the apparent conflict created by petitioner's counsel. The two cases in question are Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1973); and Archuleta v. Duffy's Inc., 471 F.2d 33, (10th Cir. 1973).

An analysis of those two cases, however, indicates that they are not in conflict with the Second Circuit's decision in this case. In Simmons, the plaintiff attempted to do more than correct a mistake in the spelling of a defendant's name.

In Simmons, the proper party defendant had not been served, and more than a year after the statute of limitations had run, the plaintiff

attempted to substitute a different party as a defendant, and deemed the summons served as to him. The Court refused to allow this amendment and stated:

> "Further, since Doris J. Fenton is not now before the Court and, in fact, has never yet been served with process, there is clearly prejudice to her if the amendment is allowed." 480 F.2d at 136.

In our case, the appropriate defendant had been served and in a timely fashion as was found by the District Court. The only defect was the misspelling in his first name and middle initial.

The other case relied upon by the defendant as creating an apparent conflict is Archuleta v. Duffy's Inc., supra. In that case, the plaintiff named as a defendant Denver Pop Company, a Colorado corporation, formerly known as and d/b/a Duffy's Inc. The true defendant was Duffy's Inc. In a 2 to 1 decision,

with a vigorous dissent, the Court found that in an equal employment opportunity case, the rules were to be strictly construed and would not permit an amendment to name Duffy's Inc. as a proper defendant after the Statute had run. Archuleta, however, should be limited to its facts. The Tenth Circuit's position on amending a compliant to correct a misnomer, is set forth in Wynne v. United States, 382 F.2d 699 (10th Cir. 1967), and that Court's decision is clearly the same as the position taken by the Second Circuit in this case. There is thus no real conflict between the Circuits with regard to correcting the misnomer, and the rule is that as set forth by Moore, in his treatise, where he states at paragraph 4.44:

> "The test should be whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely a mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually

> meant to serve and sue a different person. And this test should apply though the amendment is sought after the statute of limitations has run as to the person or entity misnamed in the process."

See also Wright and Miller in their Treatise on Federal Practice, which provides:

> "The most common occasion for amendment is when plaintiff has made a simple mistake or a technical error that results in a failure to identify defendant properly, such as when a corporation is not denominated by its registered name or defendant's name is misspelled. When the error goes to form rather than substance, as these defects obviously do, and the proper defendant receives the original process, realizes it is directed at him, and thus is put on notice of the commencement of the action, there is no reason why a federal court should refuse to permit amendment." at 4 Federal Practice and Procedure §1131.

And as the Fourth Circuit eloquently stated in United States v. A.H. Fischer, 162 F.2d 872 (4th Cir. 1947):

> "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it

names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else."

There is thus no real conflict among the Circuits and no reason to grant certiorari.

2. The question of whether the tolling of the statute of limitations takes place upon the filing of the summons and complaint with the Court or upon service does not require this Court to grant certiorari in the case now before it.

The Second Circuit in confirming the decision of the Court below reaffirmed its decision in Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2nd Cir. 1968), that pursuant to the clear language of Rule 3 of the Federal Rules of Civil Procedure, an action in the Federal Court is deemed commenced when filed, for the purpose of tolling the applicable State Statute of Limitations, and does not require actual service.

The Second Circuit made it clear that it was not confirming the decision in this case because it was bound by Sylvestri, but that:

"Moreover, our acceptance of its binding force is not grudging; we think the decision was correct for the reasons there given." 585 F.2d at 568.

The Second Circuit realized that other Circuits have taken a different position on this question. See Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 166 n. 8 (3d Cir. 1976) and Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971) with Smith v. Peters, 482 F.2d 799 (6th Cir. 1973), cert. denied, 415 U.S. 989 (1974) and Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971).

Respondent's counsel submits that this case does not require this Court to decide the question of when the Statute of Limitations is tolled when a claim based on diversity of

jurisdiction is filed in the Federal Courts since there is no real issue in this case. The defendant in this case admits that the defendant could have been served in the State of Illinois (page 3, Petitioner's Brief) and in the State of Illinois, the statute of limitations is tolled upon filing, rather than service. See Ill. Ann. Stat. ch. 110, §13; ch. 70, §2 (Smith-Hurd).

Thus, although an issue might be presented in another case where if the action were commenced in the defendant's home state, service was required to toll the statute of limitations rather than mere filing, that issue does not exist in this case, and there is no reason for the Court to grant certiorari.

CONCLUSION

The petition for certiorari should be denied as there being no issues to be reviewed

by this Court, and the well reasoned decision of the United States Court of Appeals for the Second Circuit should not be disturbed.

Dated: January 23, 1979

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